Decision **DRAFT DECISION OF ALJ PULSIFER (Mailed 5/7/2002)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

ORDER REQUIRING INTERIM CONTINUATION OF INTERCONNECTION AGREEMENT

Summary

This decision affirms and adopts the findings, conclusions, and order contained in the Assigned Commissioner's Ruling issued by Commissioner Michael Peevey on April 12, 2002 in this proceeding. Specifically, Commissioner Peevey ruled upon the motion of Verizon California Inc. (Verizon) filed on April 3, 2002, entitled: "Emergency Motion for an Expedited Order Establishing an Interim Interconnection Arrangement with Pac-West Telecomm, Inc. (Pac-West) Pending Adoption of a Commission-Approved Successor Agreement" (Motion).

Verizon brought its Motion for Commission resolution of a dispute between Verizon and Pac-West because their existing interconnection agreement (Interconnect Agreement) was due to expire on April 13, 2002, and parties had no successor agreement in place. Verizon asked that the Commission rule on its

Motion prior to the expiration of the existing Interconnect Agreement due to occur on April 13, 2002, to avoid the risk that service would be interrupted due to discontinuance of interconnection.

Pac-West filed a response to Verizon's Motion on April 8, 2002. Verizon was granted leave on April 11, 2002, to file a reply to Pac-West's response.

Background

To ensure continuity of service, interconnection must continue during the interval of time between the expiration of the parties' existing agreement and the effectiveness of a successor agreement. The Interconnection Agreement provides that if the contract is terminated and a party requests negotiation of a new contract within 60 days of the termination notice, interconnection shall continue under the provisions of the terminated contract for a period of 125 days following the termination notice. Parties have no agreement for further extension of contract terms beyond the 125-day window if no successor agreement is negotiated. Parties were unsuccessful at reaching an interim continuation agreement by April 13, at which point the 125-day extension period was due to expire. In order to provide for continued interconnection between termination of the Interconnect Agreement implementation of a successor agreement, it falls upon the Commission to impose an interim arrangement.

Accordingly, Verizon requested that the Commission require the parties to enter into an interim agreement to remain in place until negotiations conclude and a replacement agreement takes effect. For purposes of the interim agreement, Verizon proposed that the parties enter into Verizon's draft "template" pending execution of a replacement agreement. In the alternative, Verizon proposed that PacWest be required to opt into one of the existing interconnection agreements between Verizon and another competitive local exchange carrier (CLEC). Such interim agreement would continue in effect until the earlier of the expiration of the adopted terms or the date that the parties execute the replacement agreement.

Verizon claims that under either of its proposed options for interim agreements, the rates, terms and conditions applicable to Internet traffic would necessarily conform to the rate regime prescribed in the Federal Communications Commission (FCC's) Order on Remand.[1] Paragraph 82 of the Order on Remand provides that the FCC's interim rate regime for ISP-bound traffic "applies as carriers re-negotiate expired or expiring interconnection agreements." Once the provisions of the terminated agreement are no longer effective, Verizon claims that the FCC's interim rates for ISP-bound traffic automatically apply while the parties negotiate the terms of a replacement agreement.

Pac-West agrees that Verizon has terminated the existing agreement, and that parties have not completed negotiations on a successor agreement. Pac-West opposes Verizon's proposals for an interim agreement, however, arguing that both of Verizon's proposed forms of relief are contrary to law, unfair to Pac-West, and premised on unproven or erroneous facts.

Pac-West believes that the issues raised in Verizon's motion need not have risen to the level of an "emergency," but should have been dealt with routinely

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[1] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) (Order on Remand). At paragraph 82, the FCC mandated that "as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic."

in current negotiations, as Pac-West and other competitive local exchange carriers have often done with Pacific Bell, and as Verizon has done with other carriers.

Pac-West objects to Verizon's "template" agreement, arguing that its terms are one-sided, favoring Verizon. Pac-West also objects to being required to opt into an existing interconnection agreement that Verizon has negotiated or arbitrated with another party. Pac-West presented Verizon with a redline version of the "template," and asks that Verizon be required to interconnect pursuant to Pac-West's redline version if any one-sided change in the agreement is to be imposed.

Pac-West also disputes Verizon's claim that the FCC's capped rates for ISP-bound traffic "automatically" apply to a new contract. Pac-West argues that this claim is based upon Verizon's erroneous legal assumption that it has, in fact, implemented the FCC's reciprocal compensation plan in California. The FCC's rates for ISP-bound traffic do not automatically apply unless Verizon has successfully demonstrated that it has offered to exchange all traffic subject to Section 251(b)(5) at the same rate (the "mirroring offer").

In Decision (D.) 01-11-067, the Commission required that the advice letter of any carrier implementing the FCC plan, "verify compliance with the FCC Remand Order by confirming that it has offered to all carriers statewide to exchange all traffic both originating and terminating, and including Internet-bound traffic, at the FCC's capped rates." Pac-West claims that, after a diligent search, it has been unable to locate a single advice letter where Verizon has included this Commission-mandated verification.

Pac-West thus asks that the Commission require parties to continue interconnection under the status quo, with the ultimate question of the rates and other terms and conditions applicable during this interim period to be resolved as an issue in arbitration conducted pursuant to Section 252(a). Pac-West agrees to stipulate to an appropriate accounting order to keep track of transactions from April 13, 2002 until a successor contract takes effect. The accounting order would permit the Commission to subsequently adjust rates covering the interim period based upon the outcome of arbitration proceedings.

Discussion

Verizon seeks a Commission order imposing unilateral interim changes in the terms of interconnection prior to arbitration, and over the objections of PacWest. While Verizon proposes interim adoption of its "template," Pac-West counters that its own "template" version should be adopted, if any changes are imposed by the Commission. There are no facts before the Commission at this juncture upon which to base a determination as to which of the competing "templates" (*i.e.,* the Verizon version or the Pac-West version) is preferable as an interim agreement.

Likewise, there is no basis to compel Pac-West to accept terms and conditions under another CLEC contract as proposed by Verizon without the opportunity to present its position on those terms and conditions which it perceives as unacceptable or undesirable. Based on its review of existing Verizon agreements available for "opt-in," Pac-West states it would not voluntarily interconnect with Verizon under terms and conditions of any of them.

Accordingly, neither of the alternatives proposed by Verizon is acceptable as the basis for an interim agreement since each alternative would impose unilateral changes in the terms of interconnection without arbitration, or other evidentiary record. Even though changes would apply only on an interim basis, they could still be unduly burdensome to the extent a carrier is required to modify its network, procedures, etc. only to have to change them again once a successor agreement is adopted.

Based on these circumstances, Commissioner Peevey's ruling found that the only defensible alternative was to continue the status quo agreement for the interim period. We agree. We hereby affirm and adopt the findings of the Assigned Commissioner's Ruling as incorporated in this decision.

Both Verizon and Pac-West shall therefore be required to continue to be bound by the terms of the existing interconnection agreement until a successor agreement can be negotiated or arbitrated. During the interim period, until a final successor agreement is implemented, all terms and conditions under the existing contract shall continue in place, including the payment of reciprocal compensation for Internet traffic.

In its third-round reply, Verizon agreed as a compromise to continue under the terminated interconnection agreement pending Commission approval of a successor agreement, with the proviso that, effective April 14, 2002, Verizon not be required to pay Pac-West any compensation for Internet-bound traffic in excess of the FCC's interim rates. Verizon attaches to its reply a document entitled "Settlement Agreement and Release" which it asks the Commission to adopt to implement the terms of its compromise proposal.

Verizon's request that it be immediately relieved from the current contract's obligation's to pay reciprocal compensation for Internet-bound traffic in excess of the FCC's interim rates is a contested issue which cannot be finally decided through this order. Under the Remand Order, the FCC's capped rates are to take effect "as carriers renegotiate expired or expiring interconnection agreements." The parties have not yet renegotiated the expiring interconnection agreement. At this point, they have only agreed to disagree, and to leave it to the

Commission to resolve how to continue interconnection after the end of the 125-day window period, until the parties renegotiate or arbitrate a replacement interconnection agreement.

A Commission order requiring the temporary extension of the old interconnection agreement does not violate intent of the contract nor the terms of the FCC's Order on Remand and prior Commission's decisions. By creating a limited 125-day window in which the agreement would continue in effect during negotiations, the parties' stated intent was to execute a replacement agreement within 125 days of the date that the agreement terminates. Yet, the parties reached no agreement concerning what interconnection terms would apply after the 125-day window, assuming no new agreement. Instead, parties agreed to seek the Commission's determination of contract terms after April 13, if there was no successor agreement by that date.

The fact that Verizon may disagree with the outcome reached by the Commission cannot be construed as violation of any mutual "intent" under the contract since both parties agreed to have the Commission resolve the dispute, whatever that resolution may be. We therefore find nothing that violates the "intent of the parties" by temporarily extending the term of the existing agreement beyond April 13.

Our directive is also consistent with the FCC Remand Order and the Commission's own holdings in D.02-01-062 in which it stated that the interconnection agreement between Verizon and Pac-West will become subject to the FCC's restructured rates "at the time carriers renegotiate expired or expiring interconnection agreements." Since carriers have not yet concluded such renegotiations, the existing reciprocal compensation provisions shall continue in place.

The parties shall be directed, however, to include as an issue subject to arbitration, what differing terms and conditions, if any, should be applicable during the interim period between April 14, 2002, and the effective date of the successor agreement. In order to facilitate implementing any adjustments that may be subsequently applied to this interim period, each of the parties shall be required to retain adequate books and records relating to services provided and related payments made during the interim period subject to the existing interconnection agreement.

By waiting until only 10 days before expiration of the 125-day window for the Commission to resolve the dispute, Verizon failed to provide sufficient time for the Commission to adjudicate any substantive changes in the terms of the old interconnection agreement that would be fair to both sides. Thus, by its delay in bringing this action to the Commission, and by its contractual agreement to defer to the Commission on this dispute, Verizon must bear the responsibility for accepting the resolution provided by the Commission given such short notice.

Further consideration will be necessary to determine whether providing for this temporary extension of the existing contract terms constitutes a change of the existing contract such that implementation of the FCC rate caps is triggered. For the interim period, however, the status quo shall remain in effect, including the payment of reciprocal compensation for Internet traffic. In the arbitration proceeding between the parties, the Commission can take up the question of whether the provisions of the FCC Remand Order are triggered immediately upon the termination of the 125-day window period, or whether the existing rates continue until a replacement agreement takes effect following negotiation and/or arbitration of the parties' agreement.

Verizon also raises the claim that Pac-West is a credit risk, and that merely ordering an accounting of transactions, subject to later adjustment, will not produce a neutral outcome. Verizon claims that allowing Pac-West to "hold the money" while this issue of compensation is being resolved places Verizon at undue risk. Verizon has not provided a full development of all of the relevant factual considerations with respect to the risk of nonpayment by Pac-West based on its credit worthiness. A further record would need to be developed before consideration could be given to measures to address Verizon's claims regarding Pac-West's ability to make payment of any subsequent adjustments that may be ordered. This issue is properly taken up in the subsequent arbitration proceeding between the parties.

Procedural Issues

By bringing its Motion before the Commission only 10 days before the expiration of the extension period of the interconnection agreement, Verizon made it impossible for the issuance of an order by the full Commission prior to the expiration date. Under Public Utilities Code Section 311(g), the Commission decision on this motion is to be served on parties, subject to a 30-day public review and comment period, prior to a Commission vote. The review period may be shortened or waived either by a stipulation of all parties to the proceeding, or in the event of an "unforeseen emergency situation" as defined by Rule 81 of the Commission's Rules of Practice and Procedure. Verizon has not offered any argument that its motion constitutes such an "unforeseen emergency situation" or that all parties stipulate to a waiver of the 30 days under Commission Rules. Moreover, Verizon offered no solution as to how an order from the full Commission could be forthcoming prior to expiration of the contract.

Accordingly, to provide interim guidance to the parties until an order from the full Commission can be forthcoming, Assigned Commissioner Peevey's ruling was issued pursuant to Public Utilities Section 310. As prescribed by Public Utilities Code Section 310: "Any investigation, inquiry, or hearing which the commission may undertake or hold may be undertaken or held by or before any commissioner or commissioners designated for the purpose by the commission…. Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding, opinion, and order of the commission."

Commissioner Peevey stated that the substance of his ruling would be placed as an agenda item for consideration before the full Commission at the earliest practical time. Accordingly, by this decision, the Commission adopts the findings, conclusions, and orders contained in Commissioner Peevey's ruling.

Assigned Commissioner Peevey's ruling on this motion was issued in order to avoid unintended interruption of interconnection between Verizon and Pac-West due to lack of an agreement. Neither Verizon nor Pac-West have provided legitimate reasons why this matter could not have been brought before the Commission earlier, so as to achieve a resolution of the dispute by the full Commission before expiration of the interconnection agreement. Both parties should have acted more responsibly to bring this dispute before the Commission sooner. It is expected that in the future, these sorts of disputes will be brought before the Commission on a timely basis so as to avoid a repetition of this sort of incident.

Comments on Draft Decision

The draft decision of Administrative Law Judge Thomas R. Pulsifer in this matter was mailed to the parties in accordance with Section 311(g) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _________, and reply comments were filed on ___________.

Findings of Fact

1. The Interconnection Agreement between Verizon and Pac-West provides that if the Agreement is terminated and a party requests negotiation of a new agreement within 60 days of the termination notice, interconnection continues in accordance with the provisions of the terminated Agreement for a limited period of 125 days following the termination date.

2. The parties did not reach a new agreement by April 13, 2002, at which point the 125-day extension window under the contract was due to expire.

3. Because the parties' contract does not provide any agreement as to terms of interconnection beyond April 13, 2002, an interim Commission order is required to provide for continuity of interconnection until a successor agreement can be implemented.

4. There are no facts before the Commission at this juncture upon which to base a determination as to which of the competing "templates" (*i.e.*, the Verizon version or the Pac-West version) is preferable as an interim agreement.

5. There is no basis to compel Pac-West to accept terms and conditions under another CLEC contract, as proposed by Verizon, without the opportunity to present in arbitration its position on those terms and conditions which it perceives as unacceptable or undesirable.

6. The untimeliness of Verizon's filing of its motion precluded action by the full Commission prior to the expiration date of the existing agreement, which was due to occur on April 13, 2002.

Conclusions of Law

1. This conclusions in this decision conform to the requirements of Public Utilities Code Section 310 by affirming the ruling previously issued by Commissioner Peevey on April 12, 2002.

2. The findings, conclusions, and order as set forth in Assigned Commissioner Peevey's ruling of April 12, 2002, should be adopted as the findings, conclusions, and order of the Commission.

3. A Commission order requiring the temporary extension of the old interconnection agreement does not violate intent of the contract nor the terms of the FCC's Order on Remand and prior Commission's decisions.

4. Further consideration will be necessary to determine whether providing for this temporary extension of the existing contract terms constitutes a change of the existing contract, triggering implementation of the FCC rate caps.

5. D.02-01-062 stated that the interconnection agreement between Verizon and Pac-West will become subject to the FCC's restructured rates "at the time carriers renegotiate expired or expiring interconnection agreements." Until carriers have concluded such renegotiations, the existing reciprocal compensation provisions should therefore continue in place.

O R D E R

IT IS ORDERED that:

1. The interconnection agreement between Verizon and Pac-West that was due to expire on April 13, 2002, shall remain in effect continuously until a final

successor agreement is implemented through negotiation or adopted through arbitration.

2. Verizon and Pac-West shall each be required to maintain adequate accounting and other records necessary in order to be able to specify in detail all amounts billed to, and payments received from, each of the parties for services rendered under the existing agreement from the expiration date through the effective date of the successor agreement.

3. The Commission retains the right to adjust the applicable contract rates and amounts due and payable for services during the intervening period subsequent to April 13, 2002, subject to the ultimate determinations made in arbitration concerning the terms of the successor agreement.

4. The parties shall include as an issue subject to arbitration, what differing terms and conditions, if any, should be applicable during the interim period between April 14, 2002, and the effective date of the successor agreement.

This order is effective today.

Dated ____________________________, at San Francisco, California.